

2519
No. 11865

United States
Circuit Court of Appeals
for the Ninth Circuit.

TRANS-PACIFIC AIRLINES, LIMITED,
a corporation, Appellant,
vs.

HAWAIIAN AIRLINES, LIMITED,
a corporation, Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Territory of Hawaii

FILED

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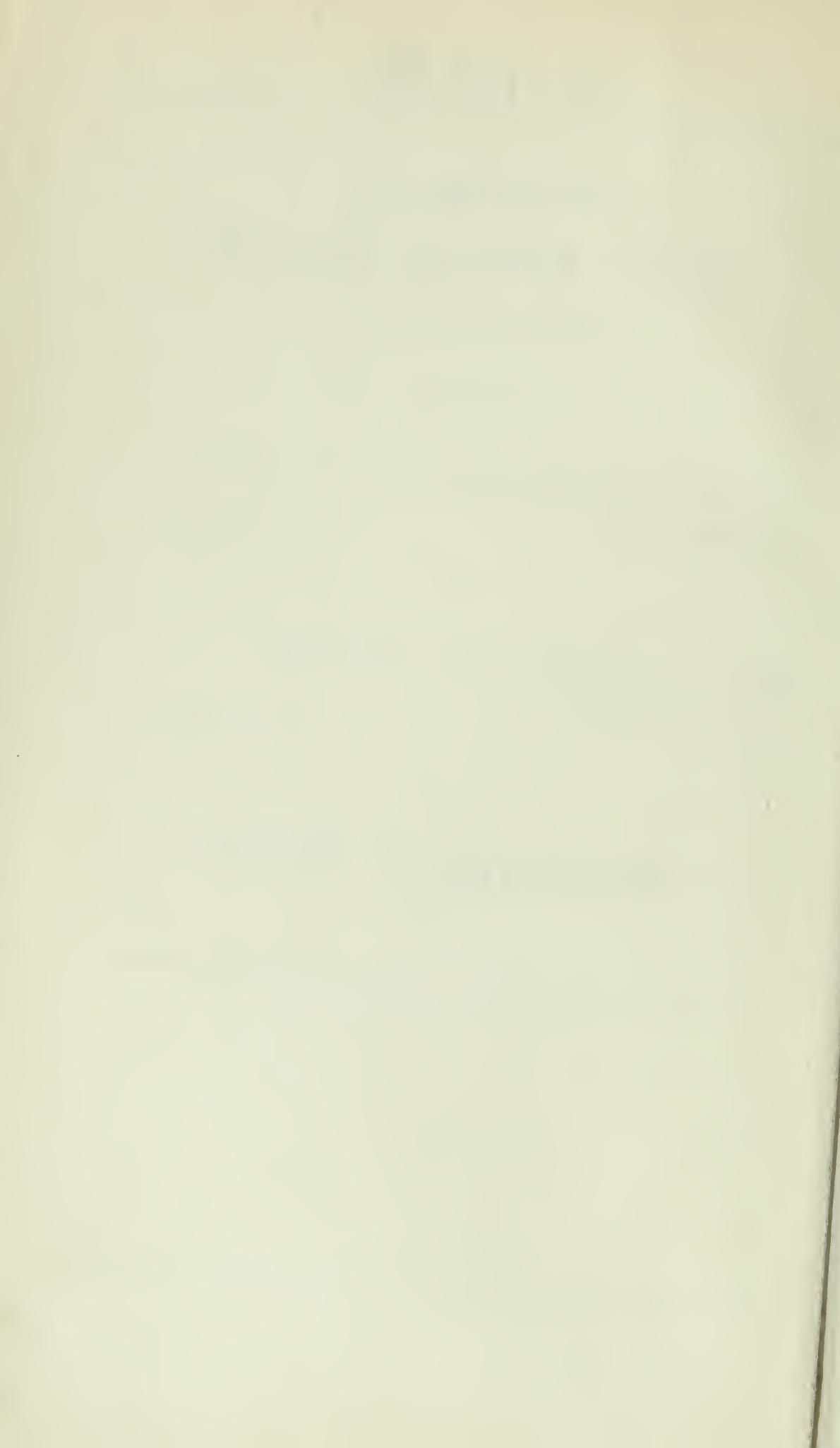
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

For the Plaintiff, Hawaiian Airlines, Limited,

ROBERTSON, CASTLE & ANTHONY,
By GARNER ANTHONY,

312 Castle & Cooke Building,
Honolulu 1, Hawaii.

For the Defendant, Trans-Pacific Airlines, Ltd.,

FREDERICK L. HEWITT,
68 Post Street, San Francisco 4, Calif.

SAI CHOW DOO,
COATES LEAR,
FONG, MIHO & CHOY,
1128 Smith Street,
Honolulu, T. H.

Amicus Curiae, Civil Aeronautics Board,

UNITED STATES DISTRICT ATTORNEY,
Federal Building,
Honolulu, T. H.

By EDWARD A. TOWSE,
Assistant United States
District Attorney. [1*]

*Page numbering appearing at foot of page of original certified
Transcript of Record.

In the United States District Court for the
Territory of Hawaii

Civil No. 817

HAWAIIAN AIRLINES, LIMITED,

Plaintiff,

vs.

TRANS-PACIFIC AIRLINES, LTD.,

Defendant.

COMPLAINT

Plaintiff, Hawaiian Airlines, Limited, a corporation incorporated under the laws of the Territory of Hawaii, complaining of Trans-Pacific Airlines, Ltd., a corporation incorporated under the laws of the Territory of Hawaii alleges:

1.

That plaintiff is the holder of a certificate of public convenience and necessity issued to it pursuant to Section 401 of the Civil Aeronautics Act of 1938, 49 U.S.C., Sec. 481, authorizing it to engage in the transportation of persons, property and mail between points within the Territory of Hawaii and since the issuance of said certificate in 1939, has continuously engaged in such air transportation as an air carrier pursuant to said act.

2.

The jurisdiction of this court is based upon [6] Section 1007 of the Civil Aeronautics Act of 1938 as amended, 52 Stat. 1025; 49 U.S.C., Sec. 647.

3.

Defendant, Trans-Pacific Airlines, Ltd., is an air carrier within the meaning of the Civil Aeronautics Act of 1938 as amended and is now engaged in air transportation carrying persons and property between points within the Territory of Hawaii by air as a common carrier and since January 1, 1947, has continuously engaged in such transportation without having a certificate of public convenience and necessity from the Civil Aeronautics Board required under Sec. 401 of the Civil Aeronautics Act of 1938 as amended.

4.

That defendant now conducts a regularly scheduled air carrier service between points within the Territory of Hawaii in violation of the Civil Aeronautics Act of 1938 to the great damage of plaintiff, the holder of a certificate of public convenience and necessity issued pursuant to said act.

Wherefore, plaintiff prays that defendant, its respective agents, servants and attorneys be perpetually enjoined from operating as an air carrier engaged in air transportation in violation of Sec. 401 of the Civil Aeronautics Act of 1938 as amended and that pending the final determination of this cause that a preliminary [7] injunction issue restraining said defendants from said acts.

Dated: Honolulu, Hawaii, September 3, 1947.

/s/ GARNER ANTHONY,
Attorney for Plaintiff.

Territory of Hawaii,
City and County of Honolulu—ss.

Stanley C. Kennedy, being first duly sworn under oath deposes and says:

That he is president of Hawaiian Airlines, Limited, plaintiff in the above cause; that he has read the foregoing Complaint, knows the contents thereof and that the same is true.

/s/ STANLEY C. KENNEDY.

Subscribed and sworn to before me this 3rd day of September, 1947.

[Seal] /s/ CHARLES Y. AWANA,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires: June 30, 1949.

[Endorsed]: Filed Sept. 3, 1947. [8]

[Title of District Court and Cause.]

MOTION FOR ORDER TO SHOW CAUSE
WHY A PRELIMINARY INJUNCTION
SHOULD NOT ISSUE

Plaintiff above named moves the court for the issuance of an order to show cause why a preliminary injunction should not issue herein against defendant, its respective agents, servants and attorneys pending this suit and until further order of this court.

This motion is based upon the verified complaint filed in the above cause and the affidavits hereto attached.

Dated: Honolulu, Hawaii, September 3, 1947.

/s/ GARNER ANTHONY,
Attorney for Plaintiff. [9]

AFFIDAVIT

Territory of Hawaii,
City and County of Honolulu—ss.

Stanley C. Kennedy, being first duly sworn under oath deposes and says:

That he is the president of Hawaiian Airlines, Limited, plaintiff in the foregoing action; that defendant is an air carrier engaged in air transportation carrying and offering to carry the public generally and its property between points in the Territory of Hawaii substantially paralleling plaintiff's operation within the said territory; that defendant since January 1, 1947, has conducted and now conducts a regular daily service as an air carrier engaged in air transportation between points within the territory; that it has an agent known as "Pacific Travel Bureau" with offices at 1113 Smith Street, Honolulu, and offices on the islands of Hawaii, Maui and Kauai which agent books and tickets defendant's passengers for travel by air on defendant's regularly scheduled routes between points within the Territory of Hawaii; that defendant's agent, Pacific Travel Bureau, for more than three months last past has advertised the service of de-

fendant as "Flights daily to all islands," said advertisements have appeared recurrently in daily newspapers published and circulated in Honolulu and elsewhere throughout the Territory of Hawaii; that defendant's agent, Pacific Travel Bureau, has similarly advertised defendant's daily air transportation by handbills distributed on the islands of [10] Hawaii, Maui and Kauai; that the conduct of said defendant as a regular scheduled air carrier has continued for a period of more than three months last past; that defendant's operations are that of a common carrier engaged in air transportation between points within the territory.

/s/ STANLEY C. KENNEDY.

Subscribed and sworn to before me this 3rd day of September, 1947.

[Seal] /s/ CHARLES Y. AWANA,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1949. [11]

AFFIDAVIT

Territory of Hawaii,
City and County of Honolulu—ss.

Ford Studebaker, being first duly sworn, under oath deposes and says:

That he is the vice president of Hawaiian Airlines, Limited, plaintiff in the foregoing action, in charge of Operations and Development; that plaintiff is an air carrier holding a certificate of public convenience and necessity issued under the Civil

Aeronautics Act of 1938, engaged in air transportation between points within the Territory of Hawaii; that Trans-Pacific Airlines, Ltd., is an air carrier engaged in air transportation between points within the Territory of Hawaii and holds no certificate of public convenience and necessity issued under the Civil Aeronautics Act of 1938; that he has observed the operations of Trans-Pacific Airlines, Ltd., particularly since January, 1947; that said defendant operates three aircraft of DC-3 type being Numbers NC63376, NC62083 and NC62086 between the several airports of the Territory of Hawaii and holds itself out to carry the public generally within the limits of its capacity; that he knows of his own knowledge that since January 1, 1947, and continuously to the date hereof, defendant has engaged in a regularly scheduled operation as an air carrier engaged in air transportation between points within the Territory of Hawaii; that in the months of July and August, 1947, he caused a survey to be made of defendant's operations [12] under his direction and control, checking the arrival and departure of defendant's aircraft at the Honolulu Airport and other airports within the Territory of Hawaii as a result of which affiant obtained details of departures and arrivals of defendant's aircraft which verified the facts of defendant's daily operations as observed by him; that from affiant's own observation and the check of arrivals and departures affiant says that defendant is engaged as an air carrier in air transportation on a

regular schedule between points within the Territory of Hawaii as a common carrier.

/s/ FORD STUDEBAKER.

Subscribed and sworn to before me this 3rd day of September, 1947.

[Seal] /s/ CHARLES Y. AWANA,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1949.

[Endorsed]: Filed Sept. 3, 1947. [13]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

It is hereby ordered that defendant appear before the undersigned presiding judge of the United States District Court for the Territory of Hawaii at his court room in the Federal Building, Honolulu, on Tuesday, September 9, 1947, at 10 o'clock a.m. to show cause, if any, why a preliminary injunction should not issue against it as prayed for in plaintiff's complaint.

Dated: Honolulu, Hawaii, September 3, 1947.

/s/ J. FRANK McLAUGHLIN,
District Judge.

[Endorsed]: Filed Sept. 3, 1947. [14]

[Title of District Court and Cause.]

MEMORANDUM OF RULING UPON MOTION
FOR PRELIMINARY INJUNCTION

J. Frank McLaughlin, Judge.

Attorneys for Plaintiff:

Robertson, Castle & Anthony, 312 Castle & Cooke
Building, Honolulu, Hawaii.

Attorneys for Defendant:

Sai Chow Doo, Honolulu, T. H.; Frederick L.
Hewitt, 68 Post Street, San Francisco 4, Calif.

On Sept. 3, 1947, the plaintiff filed its complaint
against the defendant and prayed for a temporary
and permanent injunction. An order to show cause
issued returnable Sept. 9, at which time the defendant
appeared and orally moved to dismiss the cause
for lack of jurisdiction.

Against the motion, technicalities as to form, etc.,
being waived, the plaintiff's allegations must be
taken for present purposes as true. The facts with
which the Court is presently concerned are:

1. The plaintiff is a certificated air carrier under
Section 481 (a) of Title 49, U.S.C. (Civil
Aeronautics Act of 1938, engaged since 1939
in air transportation of persons and property
in the Territory of Hawaii.
2. The defendant is also an air carrier so en-
gaged except that it does not hold a certificate
of public convenience and necessity under

said Section 481 (a), and has since January been continuously engaged in scheduled operations.

Those are the pleaded facts. Upon the return to the order the defendant orally showed in connection with its motion to dismiss that it:

- a. Held a safety certificate issued Oct. 10, 1946, by the Civil Aeronautics Administration.
- b. Held a Civil Aeronautics Board letter of registration—No. 163—as a Non-Certificated Irregular Air Carrier to operate under the Board's Economic Regulations 292.1 dated May 5, 1947 (12 F. R. 3077), which letter expressly states that it is not a certificate of public convenience and necessity.
- c. Had pending before the C.A.B. an application under 49 U.S.C., Sec. 481 (a) for a certificate of public convenience and necessity, in connection with which it had petitioned for a prompt hearing and for an exemption to operate without such a certificate pending the hearing (49 U.S.C., Sec. 496).
- d. Agreed that no formal complaint had been filed by the plaintiff with the C.A.B. regarding the matter here complained of (49 U.S.C. 642).

Argumentatively the defendant took the position that the plaintiff had alleged no violation of the Civil Aeronautics Act, and that in any event the action was premature in that plaintiff had not resorted to nor exhausted administrative remedies.

Further, claiming that the certificate which it did hold allowed it to operate as it had been doing, defendant denied the existence of an equitable basis for granting plaintiff the relief prayed for.

The motion to dismiss for lack of jurisdiction is denied and a temporary injunction will issue upon proper bond, for as this situation is viewed by the Court:

- A. The Civil Aeronautics Act gives this Court jurisdiction to act at the request of a party in interest, such as is the plaintiff, when, as here, a violation of Sec. 481 (a) is alleged (49 U.S.C. Sec. 647);
- B. The remedies afforded by the Act are permissive, not mandatory. In order to afford a prompt means of relief, Congress by this Act has given a party in interest the right of either administrative or judicial complaint, at its election. As there is no administrative complaint pending before the Board with regard to this alleged violation, this Court has no cause for refraining from acting until administrative remedies are exhausted.
- C. The facts at the moment spell out a clear case of violation in Sec. 481 (a) of Title 49, U.S.C.

The question before the Court is not, Should another air carrier certificated under Sec. 481 (a) be allowed to operate in the Territory? That is purely a question for the Board's determination upon defendant's pending application.

What is before the Court is, Should the defendant be allowed to continue operating as if it had such a certificate of public convenience and necessity in violation of the Act?

The answer is clearly No, and plaintiff being a proper party to ask for statutory relief against such unlawful competition, its remedy at law by successive suits for damage being inadequate, a certificate of public convenience and necessity being worthless unless protected in the manner [25] provided for by Congress, as had been stated, a temporary injunction will issue. This temporary injunction will restrain defendant from operating in violation of the Act. In other words, it may operate under its present certificate as an irregular air carrier engaged under Sec. 292.1 of the Economic Regulations—and as there provided—in non-scheduled flights. But until such a time as it obtains its certificate of public convenience and necessity under Sec. 481 (a), it may not act as, nor hold itself out as being, an air carrier engaged in regularly scheduled flights.

The form of the temporary injunction and the amount of the bond will be settled upon notice.

Dated at Honolulu, Territory of Hawaii, this 9th day of September, 1947.

/s/ J. FRANK McLAUGHLIN,
Judge. [26]

[Endorsed]: Filed Sept. 11, 1947. [22]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact:

(1) Hawaiian Airlines, Limited, is a holder of a certificate of public convenience and necessity issued to it by the Civil Aeronautics Board (Authority) on June 19, 1939, pursuant to Sec. 401(a) of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 481(a), authorizing it to engage in air transportation in the transportation of passengers, property and mail between points within the Territory of Hawaii.

(2) Trans-Pacific Airlines, Ltd., is an air carrier and an American citizen within the meaning of the Civil Aeronautics Act of 1938 as amended, engaged in air transportation, carrying persons and property between points within the Territory of Hawaii as a common carrier and from January 1, 1947 to September 11, 1947, conducted a regular scheduled daily service as a common carrier between points within the Territory of [82] Hawaii without having a certificate of public convenience and necessity from the Civil Aeronautics Board.

(3) That Trans-Pacific Airlines, Ltd., is an irregular air carrier having a Letter of Registration issued to it by the Civil Aeronautics Board, but during the period January 1, 1947 to September 11, 1947, has not operated within the allowable limits of Sec. 292.1 of the Economic Regulations of the Civil Aeronautics Board.

Conclusions of Law:

(1) That Hawaiian Airlines, Limited, being the holder of a certificate of public convenience and necessity from the Civil Aeronautics Board has a limited franchise to engage in air transportation between points within the Territory of Hawaii which rights have been repeatedly damaged by the unlawful operations of Trans-Pacific Airlines, Ltd., in the conduct of its regular daily scheduled service between points within the Territory of Hawaii during the period January 1, 1947 to September 11, 1947.

(2) That Trans-Pacific Airlines, Ltd., having operated a daily scheduled regular service from January 1, 1947 to September 11, 1947, in violation of Economic Regulations 292.1, Civil Aeronautics Board, has not operated under any exemption pursuant to Sec. 416 of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 496(b) or any rule, regulation or order of the Civil Aeronautics Board.

(3) That Trans-Pacific Airlines, Ltd., during the period January 1, 1947 to September 11, 1947, has been in continuous and repeated violation of Sec. 401(a) of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 481(a); that the violations by Trans-Pacific Airlines, Ltd., have been to the damage of plaintiff, Hawaiian Airlines, Limited, which has no plain adequate or complete remedy at law.

(4) That unless permanently enjoined, the continued operations of defendant, Trans-Pacific Airlines, Ltd., will result in repeated and recurring injuries to plaintiff and plaintiff's remedy in dam-

ages is inadequate; that this court has jurisdiction to enforce by way of injunction defendant's violations of Sec. 401(a) of Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 481(a), pursuant to Sec. 1007(a) of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 647.

(5) A decree permanently enjoining Trans-Pacific Airlines, Ltd., from future violations of Sec. 401(a) of the Civil Aeronautics Act of 1938 as amended, will be signed on presentation.

Dated: Honolulu, Hawaii, November 10, 1947.

/s/ J. FRANK McLAUGHLIN,
District Judge.

[Endorsed]: Filed Nov. 10, 1947. [84]

In the United States District Court
for the Territory of Hawaii

HAWAIIAN AIRLINES, LIMITED,
Plaintiff,

vs.

TRANS-PACIFIC AIRLINES, INC., LTD.,
Defendant.

DECREE

The above cause having come on for final hearing, and the issues having been tried before the court without a jury upon the complaint of Hawaiian Airlines, Limited, plaintiff, and the answer, counter claim and cross complaint of defendant,

Trans-Pacific Airlines, Ltd., and the court having entered an order for separate trial on October 13 1947, of the original complaint for injunction and the defendant's answer, and having severed the counter claim and cross complaint of Trans-Pacific Airlines, Ltd., and directed that the trial of the cause of action relating to injunctive relief proceed upon the complaint and answer and that a separate judgment be entered thereon pursuant to Rule 54, and the court having heard evidence of the parties and having made its findings of fact and conclusions of law, and it appearing to the satisfaction of the court that defendant, Trans-Pacific Airlines, Ltd., is an air [86] carrier engaged in air transportation as a common carrier for hire operating a regular scheduled daily service between points within the Territory of Hawaii from January 1, 1947 to September 11, 1947, without having a certificate of public convenience and necessity issued to it pursuant to Section 401(a) of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 481(a) and it appearing that defendant was not operating within any exemption pursuant to Section 416 of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 496(b), or any rule, regulation or order of the Civil Aeronautics Board and it further appearing that Hawaiian Airlines, Limited, plaintiff, is a party in interest and will suffer damage and recurring damage in the event a permanent injunction is not granted and it further appearing that this court has jurisdiction to grant the relief prayed for pursuant to Section 1007(a) of the Civil

Aeronautics Act of 1938 as amended, 49 U.S.C. 647, and that plaintiff is entitled to the issuance of a permanent injunction as prayed for,

Now, therefore, it is ordered, adjudged and decreed:

That a writ of permanent injunction issue forthwith restraining Trans-Pacific Airlines Ltd., defendant, its officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise [87]

(1) From engaging in air transportation in violation of Section 401(a) of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 481(a);

(2) From holding out to the public, expressly or by course of conduct, that it conducts air operations of greater regularity than that permitted by Economic Regulations No. 292.1, Civil Aeronautics Board; that "holding out" as used in this paragraph shall include advertisements by newspapers, radio, magazines, handbills, signs or other written or oral solicitation;

(3) This injunction will not prohibit operations of defendant in accordance with the exemption granted it by the Civil Aeronautics Board in Economic Regulations, Section 292.1 as amended June 10, 1947, exempting irregular air carriers as authorized by Section 416 of the said Act (49 U.S.C. 496(b)); provided, however, that violation of said regulation and of this injunction shall be determined by the application of the standard of regularity currently adopted by the Civil Aeronautics

Board, to wit: the operation of aircraft between points or within the Territory of Hawaii in air transportation of persons and property regularly or with a reasonable degree of regularity, which regularity is reflected by the operation of a single flight per week on the same day of each week between the same two points, or is reflected by the recurrence of operations of two round-trip flights, or flights varying from two to three or more such flights, between any same two points each week in succeeding [88] weeks, without there intervening other weeks or approximately similar periods at irregular but frequent intervals during which no such flights are operated so as thereby to result in appreciable definite breaks in service. It is intended by this decree to require irregularity in service between any such points but not to preclude the operation of more than one or two such flights in any given week, nor to prescribe any special maximum limitation upon the number of flights which may be performed in any one week, if infrequency and irregularity of service is otherwise achieved through variations in number of flights and intervals between flights and through frequent and extended definite breaks in service. The word "point" is herein defined as an airport and all territory in a 25-mile radius;

(4) Leave to apply for a modification of this decree and the writ issued in pursuance hereof is hereby granted either party in the event the Civil Aeronautics Board shall hereafter modify or rescind the aforesaid regulations or its interpretation placed thereon by said agency;

(5) Jurisdiction of this cause is retained for the purpose of giving full effect to this decree and for the purpose of making such further and other orders and decrees or taking such further action, if any, as may become necessary or appropriate to carry out and enforce this decree.

Dated: Honolulu, Hawaii, November 10, 1947.

/s/ **J. FRANK McLAUGHLIN,**
Judge, United States District
Court, Territory of Hawaii.

[Endorsed]: Filed Nov. 10, 1947. [89]

[Title of District Court and Cause.]

WRIT OF PERMANENT INJUNCTION

The President of the United States of America to
Trans-Pacific Airlines, Ltd., its officers, agents,
servants, employees, attorneys and those persons
in active concert or participation with
them who receive actual notice hereof by personal
service or otherwise, Greeting:

Whereas, this court on November 10, 1947, entered its decree finding that Trans-Pacific Airlines, Ltd., is an air carrier engaged in air transportation as a common carrier for hire which during the period January 1, 1947 to September 11, 1947, operated a regular scheduled daily service between points within the Territory of Hawaii without having a certificate of public convenience and necessity issued to it pursuant to Section 401(a)

of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 481(a); and that said defendant was not operating within any exemption pursuant to Section 416 of the Civil Aeronautics Act of 1938, as amended, 49 U.S.C. 496(b), or under any [91] ruling, regulation or order of the Civil Aeronautics Board and it further appearing that Hawaiian Airlines, Limited, plaintiff, is a party in interest and has suffered great damage and recurring damage as a result of defendant's unlawful operations and will continue to suffer recurring damage unless defendant is permanently enjoined from its unlawful operations, and the court having found that it has jurisdiction to grant the relief prayed for pursuant to Section 1007(a) of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 647;

Now therefore you and each of you are hereby permanently enjoined and restrained until further order of this court from doing or omitting to do any of the following acts:

- (1) From engaging in air transportation in violation of section 401(a) of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 481(a);
- (2) From holding out to the public, expressly or by course of conduct, that it conducts air operations of greater regularity than that permitted by Economic Regulations No. 292.1, Civil Aeronautics Board; that "holding out" as used in this paragraph shall include advertisements by newspapers, radio, magazines, handbills, signs or other written or oral solicitation;

(3) This injunction will not prohibit operations of defendant in accordance with the [92] exemption granted it by the Civil Aeronautics Board in Economic Regulations, section 292.1 as amended June 10, 1947, exempting irregular air carriers as authorized by section 416 of said Act (49 U.S.C. 496(b)); provided, however, that violations of said regulation and of this injunction shall be determined by the application of the standard of regularity currently adopted by the Civil Aeronautics Board, to wit: the operation of aircraft between points or within the Territory of Hawaii in air transportation of persons and property regularly or with a reasonable degree of regularity, which regularity is reflected by the operation of a single flight per week on the same day of each week between the same two points, or is reflected by the recurrence of operations of two round-trip flights, or flights varying from two to three or more such flights, between any same two points each week in succeeding weeks, without there intervening other weeks or approximately similar period at irregular but frequent intervals during which no such flights are operated so as thereby to result in appreciable definite breaks in service. It is intended by this injunction to require irregularity in service between any such points but not to preclude the operation of more than one or two such flights in any given week, nor to prescribe any special maximum limitation upon the number of flights which may be performed in any one week, if infrequency and irregularity of service is otherwise achieved through variations in numbers of flights and [93] intervals

between flights and through frequent and extended definite breaks in service. The word "point" is herein defined as an airport and all territory in a 25-mile radius.

Hereof fail not at your peril.

Witness the Honorable J. Frank McLaughlin,
Judge, District Court of the United States for the
Territory of Hawaii, and the seal of said court this
10th day of November, 1947.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk.

Let the foregoing Writ issue.

/s/ J. FRANK McLAUGHLIN,
District Judge. [94]

United States Marshal's Office

MARSHAL'S RETURN

The within Writ of Permanent Injunction was received by me on the 10th day of November, A. D. 1947, and is returned executed this 10th day of November, A. D. 1947 by leaving with Ellen Kondo, Secretary to Ruddy F. Tongg, known to me to be the President of the Trans-Pacific Airlines, Ltd., a true copy of Writ of Permanent Injunction.

/s/ OTTO F. HEINE,
United States Marshal,
District of Hawaii.

Dated at Honolulu, T. H., this 12th day of November, A. D. 1947. [95]

In the United States District Court for the
Territory of Hawaii

Civil No. 817

HAWAIIAN AIRLINES, LIMITED,

Plaintiff,

vs.

TRANS-PACIFIC AIRLINES, LTD.,

Defendant and Third Party Plaintiff,

vs.

**INTER-ISLAND STEAM NAVIGATION COM-
PANY, LIMITED,**

Third Party Defendant.

**NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS**

Notice is hereby given that Trans-Pacific Airlines, Ltd., defendant, and third party plaintiff, above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order of permanent injunction entered in this action on November 10, 1947.

Dated: Honolulu, T. H., November 20, 1947.

/s/ SAI CHOW DOO,

/s/ FREDERICK L. HEWITT,

/s/ COATES LEAR,

Attorneys for Appellants.

FONG, MIHO & CHOY,

By /s/ HIRAM L. FONG,

Attorneys for Appellants.

[Endorsed]: Filed Nov. 20, 1947. [115]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents: That we, Trans-Pacific Airlines, Ltd., a Hawaiian corporation of Honolulu, Territory of Hawaii, as principal and Norman Nip and Howard Chun of Honolulu, Territory of Hawaii as sureties, are held and firmly bound unto Hawaiian Airlines, Limited and Inter-Island Steam Navigation Company, Ltd., Hawaiian corporations, of Honolulu, Territory of Hawaii, in the penal sum of Two Hundred and Fifty Dollars (\$250.00) for the payment of which, well and truly to be made to the said Hawaiian Airlines, Limited and Inter-Island Steam Navigation Company, Ltd., the said Trans-Pacific Airlines, Ltd., as principal and Norman Nip and Howard Chun as sureties by these presents do bind themselves, their respective successors, heirs, executors and assigns, jointly and severally, and firmly by these presents. The condition of this obligation is such that whereas the above bounden [117] principal has filed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of permanent injunction entered in the above entitled cause by the United States District Court for the Territory of Hawaii;

Now, Therefore, if the said principal shall prosecute its appeal with effect and pay all costs if it fails to sustain said appeal then this obligation shall

be void, otherwise it shall remain in full force and effect.

In Witness Whereof, the said Trans-Pacific Airlines, Ltd., has caused these presents to be executed by its duly authorized officers and its corporate seal to be affixed hereto, and the said Norman Nip and Howard Chun have hereunto set their hands this 19th day of November, 1947.

[Seal] **TRANS-PACIFIC AIRLINES,
LIMITED,**

By /s/ **RUDDY F. TONGG,**
President.

By /s/ **SAI CHOW DOO,**
Treasurer,
Principal.

/s/ **NORMAN NIP,**
/s/ **HOWARD CHUN,**
Sureties. [118]

AFFIDAVIT OF SURETIES

Territory of Hawaii,
City and County of Honolulu—ss.

Norman Nip and Howard Chun being first duly sworn, each for himself and not for the other, under oath deposes and says: That they are sureties on the foregoing bond; that they are residents of Honolulu, Territory of Hawaii, and have property situated within said Territory subject to execution and

that they are worth in such property more than double the amount of the penalty specified in said bond over and above all their just debts and liabilities and property exempt from execution.

/s/ NORMAN NIP,

/s/ HOWARD CHUN.

Subscribed and sworn to before me this 19th day of November, 1947.

/s/ TAI QUAN CHING,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires June 30, 1949.

[Endorsed]: Filed Nov. 20, 1947. [119]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the United States District Court for the District of Hawaii:

Please prepare and certify a transcript of the complete record and all the proceedings and evidence in this case to be filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, upon the appeal herein.

Dated: Honolulu, T. H., this 31st day of January, 1948.

/s/ SAI CHOW DOO,

/s/ COATES LEAR,

Attorneys for Trans-Pacific
Airlines, Ltd.

Of Counsel:

FONG, MIHO & CHOY,

FREDERICK L. HEWITT,

Alakea and King Streets,

Honolulu, T. H.,

[Endorsed]: Filed Jan. 31, 1948. [123]

In the United States District Court for the
Territory of Hawaii

Civil No. 817

HAWAIIAN AIRLINES, LIMITED,

Plaintiff,

vs.

TRANS-PACIFIC AIRLINES, LIMITED,

Defendant and Third Party Plaintiff,

vs.

INTER-ISLAND STEAM NAVIGATION COM-
PANY, LIMITED,

Third Party Defendant.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S.
District Court, Honolulu, T. H., on October 13, 1947.
Before: Hon. J. Frank McLaughlin,
Judge.

Appearances:

J. Garner Anthony, Esq., appearing for Hawaiian Airlines, Ltd., and Inter-Island Steam Navigation Co., Ltd.;

William F. Quinn, Esq., appearing for Hawaiian Airlines, Ltd., and Inter-Island Steam Navigation Co., Ltd.; [126]

Frederick L. Hewitt, Esq., appearing for Trans-Pacific Airlines, Ltd.;

Coates Lear, Esq., appearing for Trans-Pacific Airlines, Ltd.;

Sai Chow Doo, Esq., appearing for Trans-Pacific Airlines, Ltd.;

Fong, Miho & Choy, Attorneys-at-Law, appearing for Trans-Pacific Airlines, Ltd.;

Edward A. Towse, Esq., Assistant United States Attorney, appearing on behalf of the Civil Aeronautics Board as *Amicus Curiae*. [127]

PROCEEDINGS

The Clerk: Civil No. 817, Hawaiian Airlines, Limited, Plaintiff, versus Trans-Pacific Airlines, Limited, Defendant; case called for trial on complaint filed therein.

The Court: Are the parties ready?

Mr. Anthony: The Plaintiff is ready.

Mr. Hewitt: Ready, your Honor.

The Court: On Thursday, when we had under consideration the motions in relation to the anti-trust phase of this case, I notified counsel, after

listening to their arguments, that I would take the matter under advisement and announce on Monday what my ruling would be. I have checked into the authorities and read those that counsel have called to my attention, and as a result thereof and in view of the nature of the cross-claim and counter-claim filed herein I am going, under Rule 13(h), to order that the Inter-Island Steam Navigation Company, Limited, be brought in as a party Defendant. I do that in order that in this one litigation all issues may be resolved and in view of the nature of the counter-claim it is not possible, as the allegations now stand and which must for present purposes be taken as true, to do complete relief in the premise without bringing in the Inter-Island Corporation.

Accordingly, I will direct that an appropriate summons issue to that third party Defendant, and that new and proper service be made upon it. [131]

Mr. Anthony: Your Honor, we waive the issuance of any further summons. Just the ruling of the Court—as I told your Honor, I was concerned with the validity of it.

The Court: Very well.

Mr. Anthony: We will consider that the Inter-Island Steam Navigation Company, the President of which is here, has been served.

The Court: And will you represent it also?

Mr. Anthony: Yes, your Honor.

The Court: Very well. We now, then, proceed this morning to a trial on the merits of that original phase of this case which we have called the injunction phase. And I have just a few minutes ago

signed an Order, confirming an oral Order heretofore made, separating the trials.

Mr. Hewitt: Your Honor, I'd like to make a motion that the law firm of Fong, Miho and Choy make an appearance in this case as attorneys, additional attorneys for the Defendant.

The Court: Very well.

Mr. Hewitt: And before Plaintiff begins to put in his case, your Honor, I have several matters I would like to take up, again going to the jurisdiction of this matter. If it pleases the Court, I would like to go ahead now, or whenever it is convenient to the Court.

The Court: Well, I take it that you are going to make some oral motions, is that it? [132]

Mr. Hewitt: That's correct, your Honor, yes.

The Court: All right. Let us hear what they are.

Mr. Hewitt: Under the Federal Rules of Civil Procedure, Rule 12(h), it states as follows—if it pleases the Court, I'd like to read this into the record, 12(h), part two:

“That, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”

On that basis I wish to make a motion to dismiss the Complaint and vacate the Preliminary Injunction upon the following grounds:

Trans-Pacific, the Defendant in this matter, is exempt from Section 401 of the Civil Aeronautics Act. Section 401 is also 49 U. S. Code Supplement

481. I'd like to read that section, your Honor, in order to lay a foundation for what I have to say further regarding it.

"No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

I wish to call particularly to the Court's attention—

The Court: Excuse me. Forty-nine what?

Mr. Hewitt: That's 49, 481.

The Court: Yes.

Mr. Hewitt: That is the section that the Plaintiff [133] is proceeding under. That section says nothing about a Certificate of Public Convenience and Necessity. It says except as to air transportation. In other words, no one could operate any kind of air transportation without a Certificate of Public Convenient and Necessity, except as provided in Section 416. Now, before I get to 416, I'd like to mention what it says in Section 292.1 of the Economic Regulations. If you haven't a copy of that, your Honor—

The Court: I had seen it many times and there is a copy available in the pleadings here.

Mr. Hewitt: Before reading Section 292.1, I'd like to go back to 401 again for a moment and point out that it was the original intention of Congress that no air carrier could operate any kind of air carrier service unless they had a Certificate of Convenience and Necessity. It was not the intention to avoid certificates of other type. In other words,

if you read the sections together, 416 and 401, you will find that 416 specifically gives the Board a right to exempt certain carriers. So 401 doesn't mean exactly what it says.

Section 292.1 is a specific exemption under 416(b), Section 416(b), which is also known as 49 U. S. Code 496. It reads as follows; paragraph "c" of Section 292.1 of the regulations states:

"Except as otherwise provided in this section, [134] Irregular Air Carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, other than the following:

- (i) Subsection 401(1) (Compliance with Labor Legislation);
- (ii) Section 403 (Tariffs);
- (iii) Subsection 404(a) (Carrier's Duty to Provide Service, etc.)"

It should be particularly noted that Section 292.1, which is issued pursuant to Section 416(b) of the Civil Aeronautics Act, provides that certain air carriers shall be specifically exempt. This air carrier—we do not deny that Trans-Pacific is an air carrier. We admit that. It has a specific exemption to operate under 401 of the Civil Aeronautics Act of 1938, as amended.

The certificate of exemption held by Trans-Pacific Airlines has never been questioned by the Board or by anyone else.

I'd like to read Section 416(b), if it pleases the Court, in order that it may be read into the record. Section "b" states as follows:

"The Authority, from time to time and to the extent necessary * * *"

That is 496, your Honor.

"* * * may (except as provided in paragraph (2) of this [135] subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

That is exactly what the Civil Aeronautics Board did here. It exempted a class of air carriers from operation of 401 of the Civil Aeronautics Act of 1938, as amended. Now, it is interesting to note that paragraph 3 of the Complaint of the Plaintiff states as follows:

"Defendant, Trans-Pacific Airlines, Ltd., is an air carrier within the meaning of the Civil Aeronautics Act of 1938 as amended and is now engaged in air transportation carrying persons

and property between points within the Territory of Hawaii by air as a common carrier and since January 1, 1947, has continuously engaged in such transportation without having a certificate of public convenience and [136] necessity from the Civil Aeronautics Board required under Section 401 of the Civil Aeronautics Act of 1938 as amended."

That is a gross misstatement of fact. It is not necessary for an air carrier to have a Certificate of Public Convenience and Necessity, as I believe I have been able to point out under this rule. This air carrier is not required to have a Certificate of Public Convenience and Necessity any more than several hundred other air carriers operating under this specific exemption. The exemption is very clear. The Board has the power. It was given the power by Congress to exempt air carriers, and it has exempted this air carrier from the provisions of Section 401. Now, we have been charged——

The Court: Excuse me. Don't you have to read paragraphs 3 and 4 together?

Mr. Hewitt: I will get to paragraph 4, your Honor, in just a minute. That is also very interesting. Paragraph 4—I will read it into the record so that we can get them together, if it pleases the Court.

"That Defendant now conducts a regularly scheduled air carrier service between points within the Territory of Hawaii in violation of the Civil Aeronautics Act of 1938 to the great

damage of Plaintiff the holder of a Certificate of Public Convenience and Necessity [137] issued pursuant to said Act.”.

Now, I'd like to refer back to Section 401. Although the allegation in paragraph 4 of the Complaint makes no statement as to 401, it merely says the Aeronautics Act of 1938, paragraph 401 does not say anything about scheduled operations or non-scheduled operations. It says any operations. Certainly paragraph 4 can't refer to 401. If it refers to anything, it refers to a regulation, 292.1. It can't refer to 401 as far as scheduled operations are concerned, because nothing is stated there. It makes no reference to scheduled operations or any other kind of operations. All it says is that no air carrier shall engage in any air transportation. That means all types of air transportation.

I think personally, your Honor, that the Complaint should fail on that ground alone. There is no reference made to it. The Civil Aeronautics Act of 1938 is all-inclusive. It certainly is not required that under the Civil Aeronautics Act of 1938 that this Defendant should have any thing other than it has. They are pleading in this Complaint that we should have a certificate of Public Convenience and Necessity as required. That is not the case, your Honor. What the Court is doing here is trying to enforce 401(a). The Plaintiff has not asked in his Complaint that you enforce 401(a). I think it is very clear. He [138] talks about the Civil Aeronautics Act of 1938. He doesn't say anything about

401(a). It would be very interesting, I think, your Honor, also to call your attention to the Section 401(a) and also 292.1 of the Economic Regulations. What the Court has been trying to do here is not to enforce anything but the regulations. And we contend, your Honor, that the regulations are something that was made by the Civil Aeronautics Authority and should be enforced by them. In other words, this Court is faced with one thing, whether or not there has been a violation. Personally, and looking at the Act itself, reading all the sections together, it doesn't say that the Court has power to determine what a violation of a regulation is.

I would like to call your attention to Section 1007, your Honor, of the Civil Aeronautics Act of 1938, as amended, and I would like to read part of it into the record.

The Court: What is the U.S.C.?

Mr. Hewitt: Forty-nine, U. C. Code, 647.

The Court: All right.

Mr. Hewitt:

“If any person violates any provision of this Act, or any rule, regulations, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Authority, its duly authorized agent, or, in the case of a violation of Section 401(a) of this [139] Act, any party in interest, may apply to the District Court of the United States, for any district wherein such person carries on his business or wherein the

violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and enjoining upon them obedience thereto."

What that is trying to say is this; I tried to point this out once before and I'd like to try and point it out more clearly. Under Section 401 of the Civil Aeronautics Act of 1938, as amended, the Board is granted certain rights to exempt from operation or from requirement under 401 for a Certificate of Public Convenience and Necessity. They issue regulations. Whether or not the regulations are adhered to or not is not the question before the Court. The question before the Court is whether or not there has been a violation of Section 401. And that question can be raised properly, very properly, if in this example there was a [140] *prima facie* violation. In other words, if an air carrier had no exemption under 401, or under 416(b) of the Civil Aeronautics Act of 1938, as amended, or there had been a determination by the Civil Aeronautics Board who has primary jurisdiction over such matters, that there had in fact been a violation, then the Court, any District Court under Section 1007 of the Civil Aero-

nautics Act of 1938, as amended, has the power and the jurisdiction to enforce that. There is nothing in the Act that says that the Court shall have power to determine what a regulation is. As I state again, a regulation is something that has been laid down by the Board. There is nothing in 401 that says that an air carrier shall be scheduled or non-scheduled, or any other air carrier. He shall not engage in air transportation. And that's all that 401 says.

Now, 416 says we'll exempt certain of these operators. They have the power and they have done it. This Defendant is exempt. They are operating under Section 292.1. The question before the Court is the determination of a violation under 401, not an interpretation of 292.1.

I'd like also to call the Court's attention to a case which has some bearing on this. There has been very little law on this point. In fact, it is a new piece of law as far as aeronautics is concerned. I remember a discussion on the Alaska case, Alaska Air Transportation, Inc., versus Alaska [141] Airplane Charter Company, and I'd like to read portions of the Court's opinion. I believe you have a copy of it, haven't you?

The Court: This is the same Alaskan case?

Mr. Hewitt: The same Alaskan case.

The Court: All right.

Mr. Hewitt: The Court said: "Defendant admits that it is engaged in carrying persons and property by air for hire, and that it has not obtained a certificate, but denies that it is a common carrier."

The Court further states:

“The evidence further disclosed that the operation of the Defendant was entirely non-scheduled, confined to so-called charter flights by one 10-place and two 2-place airplanes.”

The Court further stated as follows:

“The Defendant admitted at the hearing that it had no Certificate of Public Convenience and Necessity and was not exempted from such requirement under Section 416(b).”

All right. The cases are not parallel, yet it was made to believe that they were. Now, the sole point in the Alaska case was whether or not we were an air carrier or not. We don't say we are not an air carrier. In fact, as I stated a few moments ago, we admit that we are an air carrier, and we are under Section 292.1. There is no question about it.

Now, the only thing that the Court could do in the [142] Alaska case was to take jurisdiction. There was a *prima facie* violation upon a few facts, a showing of very few facts. It showed absolutely that the Defendant not only didn't have a certificate, which I again state is a Certificate of Public Convenience and Necessity, but he also didn't have any exemption. He didn't have anything. And he was operating airplanes. That is a *Prima facie* violation of Section 401 in that he had no certificate of any kind. It doesn't state anything in 401. I repeat it again, about scheduled or non-scheduled operations. It certainly is not analogous to this case. Here this Defendant not only has an exemption

under 416(b) of the Civil Aeronautics Act of 1938, as amended, but he also has certain other privileges. He has got to comply with the Act. He has got to comply with C.A.R. 42, which pertains to the safety operations. In fact, he has to comply with practically all the sections of the Act.

I'd like to call to the Court's attention what we call the Adler case, which is in 41 Federal Supplement, page 366—

The Court: I read that this morning when you caused it to be sent in to me.

Mr. Hewitt: Well, I didn't intend that you should read it when I sent it in. In fact, I wanted to give it to the Clerk. But I'd like to read part of it in the record. I wanted to have it available to you. That goes to the primary [143] jurisdiction. We claim in this case that the Court has no jurisdiction, that the primary jurisdiction rests with the Civil Aeronautics Board. The Adler case was a very clear case on that point.

The Court: It is entirely different, though, isn't it? That involves somebody complaining because they didn't maintain a schedule.

Mr. Hewitt: That's right. But whether it is in the reverse or not doesn't really make any difference. It lays down the law of primary jurisdiction.

The Court: Well, that may be a sound principle except where a statute such as this one in one particular area gives the Court concurrent jurisdiction with the Board.

Mr. Hewitt: Well, it gives them concurrent jurisdiction, your Honor, but it gives it in terms

of a violation. It doesn't say that the Court can interpret a violation. It makes no reference in any of the parts of the Civil Aeronautics Act that a line can operate a scheduled, non-scheduled, irregular, charter, or anything else. I think it is entirely different, your Honor.

The Court: How do you square your position with the statute and the position taken here by the C.A.B. as *amicus curiae*, which says, as I understand it, that this 401, which is also 481 of Title 49, relates to common carriers?

Mr. Hewitt: I don't think there is any question about [144] it. I think we are a common carrier. I think we are an air carrier. And I also think that we are a common carrier.

I would like to discuss this brief filed by the C.A.B. I planned to do it a little later, but if you'd like to have me do it now, I'd be very glad to because I'd like to tear this thing apart. In the first place, it is not a brief under the terms which they were supposed to submit it. It looks like a trial brief to me.

The Court: In fact, that's what it is denominated.

Mr. Hewitt: Well, that is not the way they are supposed to be in here.

The Court: Well, I don't know exactly whether that is quite a correct statement or not. The request was made by the Government for leave to intervene as *amicus curiae*. That was granted by the consent of all parties concerned and the Court. And the next thing that happened was that they filed this

thing which they denominated a trial brief. No restrictions were actually placed upon it.

Mr. Hewitt: I will agree with the Court on that, but it seems to us to be a very unfair brief in many respects.

The Court: You have all had it in advance of trial, as have I.

Mr. Hewitt: That's right, but we couldn't do anything about it. I would like to read part of this Adler case in the record. [145]

The Court: You may.

Mr. Hewitt:

“Under the primary jurisdiction doctrine, the court was without jurisdiction of action against common carrier by air to recover damages for canceling a scheduled flight requiring plaintiff to make other arrangements for his transportation, where plaintiff failed to show a finding by Civil Aeronautics Board that practice of canceling scheduled flights was unlawful or unreasonable, or that plaintiff exhausted all of his remedies before the Board.”

I'd also like to read this item:

“The primary jurisdiction rule or doctrine provides that when Congress has created an administrative commission, board, or other agency with jurisdiction over and power to regulate some particular field of endeavor, state and federal courts cannot grant relief to any person complaining of any act done or omitted

to have been done if act or omission is of such nature as to be within sphere of regulation of administrative agency involved, until such time as person complaining has exhausted his remedies before such administrative body."

I'm still reading:

"The proposition advanced by the defendant in support of this motion was the primary jurisdiction question."

It seems to me that this Court is trying to interpret [146] regulations and trying to determine what a violation is. I don't believe that that is within the power of the Court to do so. I think the Plaintiff's Complaint is faulty throughout, as I have already pointed out. I believe that there has been before the Board a Complaint made under Economic Regulation 285.14, which is followed in Section 1002 of the Civil Aeronautics Act of 1938, as amended; 1002 is also known as—

The Court: You mean where Hawaiian appeared in opposition to your application for a Certificate of Public Convenience and Necessity before the Board?

Mr. Hewitt: No, sir, I do not. I refer to something entirely different, which I'd like to read. Section 1002 of the Civil Aeronautics Act of 1938, as amended, is also 49 U.S.C. 466—42—that pertains to persons filing complaints before the Board.

The Court: I thought it was admitted heretofore that in relation to this subject matter that is now our concern this was no matter pending before the administrative board.

Mr. Hewitt: That is correct. And that was a misstatement if there ever was one. I think there definitely has been a complaint before the Board. I think that Counsel for the Plaintiff knew it at the time.

The Court: Well, there is nothing in our record now, is there? [147]

Mr. Hewitt: There is nothing in the record now, but I am going to put something in the record.

The Court: All right. What is it?

Mr. Hewitt: There is a petition that Plaintiff has filed in the matter of the application of Trans-Pacific Airlines, Limited, before the Civil Aeronautics Board, petition to intervene. I want to read—

The Court: Well, that is the same thing I asked you about. You said "no." That's where they sought to intervene in connection with your application before the Board for a Certificate of Public Convenience and Necessity.

Mr. Hewitt: I didn't understand the Court. I thought you meant our petition for certificate.

The Court: I don't think that is actually in the record. I think references have been made to it in the course of discussion in or out of court. But I don't think it is in the record. But if you'd like to put it into the record—

Mr. Hewitt: Yes.

Mr. Anthony: If the Court please, I object to have anything in the record. If we want to have a jurisdictional argument, let's have it. We are not putting in evidence here.

The Court: Well, this relates to jurisdiction?

Mr. Hewitt: It certainly does.

Mr. Anthony: I don't see that it is proper at all that [148] anything should be read into this record other than conduct this argument on the jurisdictional question.

The Court: I think it relates to jurisdiction. Rather than reading it into the record, I think you had better supply it to the Clerk.

Mr. Hewitt: All right. I'd like to read portions of it. I won't read all of it.

The Court: You may.

Mr. Hewitt: Paragraph 2—I'd like to submit it as an exhibit, your Honor.

The Court: You may.

Mr. Hewitt: Exhibit 1.

The Court: Subject to your objection.

The Clerk: Defendant's Exhibit 1.

(The document referred to was received in evidence as "Defendant's Exhibit 1.")

The Court: It is an exhibit relating to this motion?

Mr. Hewitt: That is correct, your Honor.

The Court: I am going to receive it over Mr. Anthony's objection, and he may have an exception. All right.

Mr. Hewitt: Very well. Paragraph 2 states as follows:

"That Trans-Pacific Airlines, Ltd., applicant above named, is a corporation incorporated under the laws of the Territory of Hawaii and

is an air carrier within the meaning of the Civil Aeronautics Act of 1938 as [149] amended and is now and since January 1, 1947, has been continuously engaged in air transportation carrying persons and property between points within the Territory of Hawaii by air as a common carrier without having a certificate of public convenience and necessity from the Civil Aeronautics Board; that said applicant since January 1, 1947, to the date hereof has conducted and is now conducting a regularly scheduled air carrier service between points within the Territory of Hawaii in violation of the Civil Aeronautics Act of 1938, and in violation of the Economic Regulations, Part 292, issued by the Civil Aeronautics Board.”

I want to call the Court’s attention to the fact that paragraph 2 of the Petition to Intervene is practically identical with paragraph 3 of the Complaint:

“Defendant, Trans-Pacific Airlines, Ltd., is an air carrier within the meaning of the Civil Aeronautics Act of 1938 as amended and is now engaged in air transportation carrying persons and property between points within the Territory of Hawaii by air as a common carrier and since January 1, 1947, has continuously engaged in such transportation without having a certificate of public convenience and necessity from the Civil Aeronautics Board required under Section 401 of the Civil Aeronautics Act of 1938 as amended.” [150]

In the Petition to Intervene they also brought in the fact that we are violating Economic Regulations 292.

The Court: Isn't the purpose for which the same thing may have been said of importance and of significance? In other words, what you may be charged with doing may be a violation of the law and also may be for different purposes a ground for denying a Certificate of Public Convenience and Necessity.

Mr. Hewitt: That's right, your Honor, but under Economic Regulations 285.14 it doesn't make any difference whether it is an informal complaint or a formal complaint or anything else. If this isn't a complaint, I don't know what it is. It is not a proper cause for intervention by any manner or means. It is a complaint.

The Court: Was it granted?

Mr. Hewitt: I imagine it was granted. (To Mr. Lear) Do you know whether it was?

Mr. Anthony: There has been no action taken. It was filed after the filing of this suit.

The Court: It was filed after the filing—

Mr. Anthony: After the filing of this suit. And it was just so that we could be made a party and be served with papers in the pending application.

The Court: Does this exhibit show that? [151]

Mr. Anthony: If he puts it in evidence, it will show that.

The Court: It has been received.

Mr. Hewitt: It was filed, your Honor, prior to the hearing on the Preliminary Injunction.

The Court: Well, that is not particularly important.

Mr. Hewitt: I consider it a complaint. I don't believe, in fact, I didn't know it had been filed. If I had, I would have stressed the point that it had been filed before that hearing. And I think it has a very distinct bearing on this cause because the matter is definitely before the Civil Aeronautics Board. It has an additional ground which I would like to submit to the Court, that this Court does not have jurisdiction, and there are many cases, some of which I cited on the matter.

The Court: Well, I stated at the time of my original ruling that had there been an administrative issue identical to this pending, I would not have acted.

Mr. Hewitt: That is correct, your Honor. And I believe that this is a complaint if I have ever seen one.

The Court: Let me see it. (Document referred to handed to the Court.) This exhibit, however, shows nothing as to when it was filed.

Mr. Anthony: It shows a certificate of service, your Honor, which is a prerequisite under the rules, of September 5th. [152] That means some time after September 5th it reached the C.A.B.

Mr. Hewitt: It was actually filed, mailed about the 5th of September, is that correct?

Mr. Anthony: That's what the certificate says.

The Court: What is the date of this case?

Mr. Anthony: September 3rd, your Honor.

The Court: September 3rd?

Mr. Hewitt: Also at the time of the hearing the question came up and I made the statement that I did not know whether or not there had been any complaint made. In fact, I made the statement, as far as I know there was not.

The Court: That's right.

Mr. Hewitt: So I was quite surprised to see petitioner intervene disguised as a complaint. I considered it as a complaint and I want the record to so show.

The Court: But even as of this moment, regardless of what it may be, you do not know, or either of you, as to whether that has been granted?

Mr. Hewitt: No, I do not know that.

Mr. Anthony: No, we have not been advised.

Mr. Hewitt: I have not been advised whether it's been granted or not. In closing, I would like to make this last statement, that Section 401 of the Civil Aeronautics Act of 1938, as amended, makes no reference to scheduled airlines [153] or non-scheduled airlines. It states that you can't operate an air transportation system without a Certificate of Public Convenience and Necessity.

In turning to Section 416, already cited in this case, we find that the Civil Aeronautics Board has the right to exempt from Section 401 any air carrier or class of air carriers. We submit, your Honor, that this air carrier has in fact been exempt under Section 401. We also submit, your Honor, that the complaint of the Plaintiff does not charge a violation of Section 401. His allegation in paragraph 4 states a violation of the Civil Aeronautics Act of 1938.

We submit also, your Honor, that we have engaged in air transportation as an air carrier and common carrier, if you please, under an exemption issued under Section 416. We also state that Plaintiff's complaint, paragraph 3, says that we have to have a Certificate of Public Convenience and Necessity. We submit that is not the fact.

We also, your Honor, state that the Court does not have jurisdiction, primary jurisdiction, to determine whether or not there has been a violation of an Economic Regulation of the Civil Aeronautics Board. That is entirely within the province of the Civil Aeronautics Board, and we submit the Court does not have jurisdiction.

We move that this Complaint be dismissed and that the [154] Temporary Injunction be vacated herewith.

Mr. Anthony: Does your Honor care to hear from me?

The Court: If you wish to be heard.

Mr. Anthony: I will be very brief, your Honor. This is a rehash of what we have on the application for a preliminary Injunction. The main fact of the matter is this, your Honor, Section 401 of the Act prohibits any person engaging in air transportation without a Certificate of Convenience and Necessity. Now, we contend that the allegation here is that this Defendant has been conducting a regularly scheduled air line as a common carrier, as defined in Section 401 of the Act, and that therefore its operations may be enjoined pursuant to the expressed command of Congress in Section 1007,

giving this Court jurisdiction at the instance of the Board or any party in interest to enjoin a violation of Section 401(a) of the Act.

Now, what my friend on the other side is saying is this: It is true that we hold no certificate under 401(a) of the Act, but, says he, we are exempt under Section 416. And when he goes to Section 416 he discovers that there is an Economic Regulation 292.1 which says that certain irregular air carriers, as defined in that regulation, are exempt from 401(a). In other words, as a matter of defense, in order to resist the charge that he is in violation of Section 401, he looks to the exemption contained in 416 [155] and says that we are exempt under 416.

Now, obviously, if they were doing what they are permitted to do under Section 416 and Economic Regulation 292.1, we would never have filed this suit. It is for the very reason that they are not operating in accordance with Section 401 that we brought this suit to enjoin their operation. Now, they can't come in here and say, we assert as an affirmative defense that we are exempt. And, incidentally, there is no evidence before the Court that they are exempt, because we are an irregular air carrier and we are obeying the regulations. And again there is no evidence of that.

The Court: Well, just a minute. There is in the record evidence that they do hold a certificate as a non-scheduled air carrier.

Mr. Anthony: They hold no certificate, your Honor. They hold a letter of registration.

The Court: Whatever you call it.

Mr. Anthony: As a non-scheduled air carrier. Of course, that letter of registration does not permit them to operate in violation of Section 401.

Mr. Hewitt: Your Honor, that is not the issue as to what it permits us to do.

Mr. Anthony: If I may conclude without any further interruption, I will appreciate it.

The Court: Proceed. [156]

Mr. Anthony: The section under which that certificate is issued, namely, the letter of registration, is in pursuance of Section 416, which says that certain classes of carriers may be exempt from 401. They go from that Section 416 to discover whether or not the Board has done anything in pursuance of that section. And then they say, Yes, the Board has adopted 292.1 applicable to irregular air carriers, i.e., those not operating under or on a regularly scheduled basis as defined in the regulation. Then their argument is a complete non sequitur from there on. And it is this: Because we are denominated as an irregular air carrier under Economic Regulation 292.1. Notwithstanding the fact that we are a regular and a scheduled air carrier, that therefore we are not in violation of 401. And that is a complete non sequitur. The Court has jurisdiction. The Act of Congress expressly grants the Court jurisdiction. And the administrative interpretation of the Board itself concurs in our position.

The Court: Do you wish to be heard?

Mr. Towse: No, your Honor, not upon this point.

The Court: Mr. Hewitt?

Mr. Hewitt: Well, I have very little to say regarding it, your Honor, except that his statement as to interpreting 292.1 again I object to it on the ground that the interpretation of operations under 292.1 rests with the Civil Aeronautics Board. [157] That is the regulation.

The Court: Except perhaps as it may be drawn into the issue indirectly and pursue under 401.

Mr. Hewitt: It certainly does. And we admit earlier, if a determination had been made in fact by the Board that there had been a violation, and the Court should enforce that; or where there is a *prima facie* case where there is no exemption of any kind, because, after all, 401 doesn't say anything about scheduled, non-scheduled or anything else.

The Court: It does talk about common carriers.

Mr. Hewitt: It certainly does. And we admit that they are a common carrier.

The Court: You do?

Mr. Hewitt: Of course, we do. It states so in 292.1. There has never been any doubt about that. We have a right to hold out to the public that we will carry them. And we also have a right to hold out to the public that we will carry them under certain conditions. Now, those conditions are determinable facts under 292.1. There has never been any doubt about that. And I don't think there is any now. That is the difference between this case and the case in the Alaska case.

The Court: In other words, your position is that you are an air carrier and as such a common carrier

holding not a [158] Certificate of Public Convenience and Necessity but a letter of registration as an irregular scheduled airline?

Mr. Hewitt: Not exactly that way. We hold an exemption exempting us from compliance with Section 401. The exemption which we hold is an Economic Regulation under Economic Regulations 292.1. Now, as to the interpretation of operations, again I want to state that 401 doesn't say anything about what type of operations. It just says air transportation. So we can't interpret under 401 anything pertaining to Section 292.1. That is within the jurisdiction primarily of the Civil Aeronautics Board.

The Court: Well, how can you be a common carrier and operate on an irregular basis?

Mr. Hewitt: You can. You can hold out to the public that you will carry them under certain circumstances. There is no question about it. The definition of a common carrier has been very clear. In fact, the brief that was filed is 90 per cent on whether you are a common carrier or not. Mr. Lear states that they wouldn't issue a letter of registration under 292.1 unless we are a common carrier. So I think we are. We admit that we are a common carrier. I don't think there is any doubt about it. And as a common carrier we are exempt under 401. And anything pertaining to our operations which is not alleged in the Complaint—any part of the allegations pertaining to scheduled or non-scheduled in [159] connection with 401 is error and I don't believe is properly pleaded. We are

exempt under 401(a) by virtue of our letter of registration. We are a common carrier, and I don't believe that the Court can interpret 292.1 of Economic Regulations.

That's all I have, your Honor. I'd like to ask the Court for a short recess.

The Court: I will state my ruling on this and then we can take a recess. It seems to me the situation is exactly the same as that which was considered by the Court in relation to the motion for a Preliminary Injunction. True, it has been perhaps more fully argued at this time, but I see no difference in the situation other than this exhibit under the motion labeled—what is it?

The Clerk: No. 1.

The Court: For the purposes of the motion, No. 1, namely, this petition by Hawaiian Airlines to intervene before the Board in the Defendant's pending petition for a Certificate of Convenience and Necessity. For, as I said heretofore, had there been exactly the same issue pending before the Administrative Board, this Court would be reluctant to act until the administrative remedy was exhausted. But I was advised then that there was no such then pending before the C.A.B., and I do not think that this Exhibit 1 constitutes a matter pending, involving the same precise, [160] identical issue for two reasons: One, there is nothing to show that it was acted upon or has been acted upon; it was filed with the C.A.B. after this case was instituted, after this Court took jurisdiction; and quite regardless though it may possibly be a mouthing of the

same points of view as are directly involved here, definitely certain things may be said for one purpose and also for another. And it does appear that the Petition to Intervene before the Board in T.P.A.'s pending application for a Certificate of Convenience and Necessity is, one, taken in the desire to preclude the Board from granting or to persuade the Board from granting to the T.P.A. a Certificate of Convenience and Necessity. As I heretofore said, that is not the issue in this case. This Court is in no wise concerned as to whether there should be one, two, twenty or forty common carriers in this Territory. That is exclusively a matter for the Civil Aeronautics Board to determine.

My only concern here is, under the statute, whether or not until such a time as a Certificate of Convenience and Necessity has been issued properly by the C.A.B. a person such as the Defendant may operate in a manner as alleged here as if it had such a Certificate of Convenience and Necessity. And that is the issue we are going to try this morning.

So my ruling on the point of jurisdiction is adhered to, [161] and you may have additional exceptions if you so desire. It is not necessary, but perhaps you will feel better if you take them.

Mr. Hewitt: I would like to have the record show, your Honor, that exceptions were taken.

The Court: The record may so show. And we will take a brief recess and then start the trial.

(A short recess was taken at 10:55 a.m.)

After Recess

The Court: Are the parties ready?

Mr. Hewitt: Your Honor, in order to clarify the issues here, are we being charged with a violation of 401(a) of the Civil Aeronautics Act of 1938?

The Court: That is my understanding of the allegation.

Mr. Hewitt: The Complaint doesn't show that, your Honor.

The Court: Well, it is only 401(a) as to which this Court has jurisdiction.

Mr. Hewitt: If that is the issue, that's all I wish to know, your Honor. Also, if there is any additional charge here, I'd like to know what the charge or charges are. I don't mind them here at all, but I just want to clarify the issues.

The Court: It is my present understanding.

Mr. Anthony: The Complaint speaks for itself, and Counsel can read it. [162]

* * * * *

Mr. Anthony: We rest, your Honor.

The Court: Very well.

The Court: Does the defense wish to make an opening statement?

Mr. Hewitt: No, your Honor. The defense, however, would like to make a motion at this time under rule 41(b), of the Federal Rules of Civil Procedure, that this complaint be dismissed on the general grounds that upon the facts and the law the Plaintiff has shown no right to relief.

The Court: In other words, you are asking under that rule for an involuntary dismissal?

Mr. Hewitt: That is correct.

The Court: I have heard your motion. On what do you base it?

Mr. Hewitt: Under the rule it is not required to make specific grounds before the Court. The rule specifically states, your Honor, which I call your attention to, that it can be made on general grounds. It is not required that it be specific. If the Court requests, why I will be very glad to be specific on the matter.

The Court: Well, regardless of what the rule says, I don't do business that way. You have got to tell me what you have in mind. [586]

Mr. Hewitt: In the first place, the facts as presented by the Plaintiff have not proved that this Defendant is operating a scheduled airline. The law is uncertain. The allegations of the complaint and the facts presented as evidence in this case have not been tied in. They have been conflicting. There has been considerable evidence, your Honor, which has no bearing on the issues involved, which are merely this, as to whether or not the Defendant is violating section 401(a) of the Civil Aeronautics Act of 1938 as amended. There has been no proof that the Defendant has violated it. The Defendant has plaintiff's testimony in that the so-called flights of the Defendant have been shown by testimony to have been charter or contract flights to Pacific Travel Bureau from January 1st until approximately April. Subsequent to that time the flights of the Defendant may or may not have been contract or charter flights.

There has been no showing by this Plaintiff as to what type of flights they were. There has been no showing that this Defendant has in fact operated a scheduled airlines such as is operated by scheduled airlines who have been certified by the Civil Aeronautics Board, and actually have in possession and in force a Certificate of Public Convenience and Necessity.

A Certified airline must fly the schedules as published. They must fly the schedules regardless of whether or not they [587] have passengers. They also have to file their schedules with the Civil Aeronautics Board, none of which is required of this Defendant.

The testimony clearly brought out by the Plaintiff in using Defendant's witnesses, adverse witnesses, shows that the Defendants may and had in fact cancelled many flights because they did not have a load. There is no compunction or compulsion on this Defendant to fly at any time. They can fly when, as and if they desire. That is not a scheduled operation. A scheduled operation is one that is being flown at all times under the direct supervision of the Civil Aeronautics Board as to the economic factor involved, none of which has been proved by this plaintiff.

So far as the law itself is concerned, you Honor, we have questioned the jurisdiction. We still question the jurisdictional matter. We feel that this Plaintiff's duty was to go to the Civil Aeronautics Board. We feel that this is a complex problem. We feel that the Plaintiff, if he has done anything at

all, and it is doubtful in my mind, has shown that our operations may or may not be in violation of section 292.1 of the economic regulations of the Civil Aeronautics Board. The question before the Court is not a violation of the economic regulations, of 292.1. It is simply as to whether or not we have violated section 401(a). [588]

The Plaintiff's complaint, as alleged in paragraph four, states that we have violated the Civil Aeronautics Act. It doesn't say we violated section 401(a) at any time.

I feel as though the law in the matter as to primary jurisdiction should also be forceably brought out in this case. The Supreme Court has ruled many many times. The cases are abundant on the matter, but where the problem is complex, where the administrative body has in fact taken jurisdiction, that a District Court shall not then take jurisdiction to determine the matter.

I wish also to point out to the Court that again I would like to stress this point, that the jurisdiction of problem as set out in section 1007 of the Civil Aeronautics Act of 1938 as amended states that the District Court shall have jurisdiction in case of a violation. It doesn't say the Court shall have jurisdiction to determine the violation. It was not the intention of Congress that the Courts would determine them, what a violation was in accordance with some rule not involving the actual practice of the particular case before the Court.

This Plaintiff has tried to prove, which I do not think he has proved, that we have violated section

401(a). We do not believe that that is a case properly before this Court. We feel that section 401(a) calls for a violation. If in fact a violation has been determined by the Board, the Courts may then [589] enforce compliance with any order that may have been issued by the Civil Aeronautics Board. Or in another case, if in fact there is a *prima facie* violation, the Courts automatically have jurisdiction. That was the case in Alaska. That is not our case here. I think the evidence has shown that.

Another point I wish to stress with the Honorable Court is simply this: That where a complaint has been filed with an administrative body that has been formed for the sole purpose of administering intricate technical problems such as aviation or types of operation in aviation, that that Board shall take jurisdiction to determine whether or not there has been a violation.

In this particular instance a complaint has in fact been filed with the Board. It was not filed at the time this action was commenced. However, it was filed prior to the hearing on the preliminary injunction. This Defendant received a copy of that so-called petition and a letter from counsel for the Plaintiff; the date on that letter was September 5, 1947.

Now, as to whether or not a complaint has to be a formal complaint or whether or not it has to be informal or just what it is necessary to call the matter is not an important point. Under the economic regulations section 285.14 no type of complaint is required. It is not necessary that it be in any par-

ticular form. It is not necessary that it be formal. Nor is it necessary [590] that it be in fact given to the Civil Aeronautics Board as a complaint. I think the wording of the complaint itself and the wording of the petition to intervene are so identical, which we will show, that the Civil Aeronautics Board has in fact this very matter before them at this time, It is the duty of the Civil Aeronautics Board to determine these matters. And I do not believe, as a matter of law, that this Plaintiff has shown any right to relief in this matter.

I have other grounds, your Honor, but I would prefer, unless your Honor insists, to hold them.

The Court: All right. I appreciate the jurisdictional arguments that you have made. We have been over them before. My ruling on that will be the same. But on this point that you make that certified airlines must file a schedule and fly it, is it your position that one can avoid the necessity of a certificate by not filing a schedule and flying when it pleases and if it pleases?

Mr. Hewitt: Your Honor, a certificate involves many privileges which a non-certificated carrier does not have, such as mail planes and many other things. It is not my contention that an irregular non-scheduled carrier fly a scheduled airline except in this particular point. This Defendant has been exempt from compliance with 401(a). Now, being exempt from section 401(a), just what is the type of operation, if anything, [591] it is a violation of an economic regulation which must be interpreted in light of the facts surrounding the particular operation at the particular time involved.

I do not say, and I certainly don't want the Court to believe, that I mean that a non-certificated air carrier can fly in the same manner as a certificated air carrier. I do not. But he is privileged to fly within certain limitations. He may fly all the contract flights he wishes to fly. He may fly all the charter flights he wishes to fly. He may fly in such a manner. No particular—no trip per day or per week, so long as in fact he hasn't a set, what is called a pattern of regularity.

Now, the evidence before this Court—and again before I make that statement, that is interpreting not section 401(a) or a violation thereof but that is again interpreting the economic regulations, particularly section 292.1. So I say this, your Honor, that there has been no proof by this Plaintiff that this Defendant's flights have not been in accordance with their privilege to fly under section 292.1. If anything, it is an interpretation of the Act and not a question of violation of section 401(a) of the Civil Aeronautics Act of 1938.

The Court: Mr. Anthony?

Mr. Anthony: If the Court please, I shall be very brief. The jurisdictional question I shall not touch on. It has been [592] gone into about four times in this Court. The only other question that he had raised that has not been heretofore passed on by the Court is whether or not the evidence in this case shows that this Defendant is operating as an irregular air carrier. I think it is perfectly clear that the evidence is overwhelming both from their own lips, from their own records, that they have

been operating a scheduled service. They have been operating a scheduled service. They are not an irregular air carrier, which is the limit of their allowable air transportation.

The Court: Just interrupting you there, as I understand Mr. Hewitt, he says at most you may possibly have established that the T. P. A. has operated in violation of economic regulation 292.1 But that may not and is not in his opinion the equivalent of a violation of 401(a).

Mr. Anthony: That is what I was going to proceed to forthwith. In the first place, all air transportation by any air carrier without having a certificate of Public Convenience and Necessity under 401(a) of the Act is prohibited. No question about that. Now, the Defendant comes along and says there is a section in 401(a), rather, section 416 permits the Board to grant certain exemptions as to certain classes of air carriers, which will exempt them from the provisions of section 401. That section says that the authority may from time to time establish just and reasonable classifications for groups of air carriers [593] for the purposes of this title. Now, what he is saying is this: We are required in order to conduct any air transportation to hold a certificate, but we come within an exemption. The exemption is sound in section 416 of the Act and in the regulation 292.1 issued in pursuance of the exemption.

This indeed is the same, it is an analogous argument to what was made when the temporary injunction was argued. Whether or not they are exempt

then rests with this Defendant to show that they are acting under the exemption and they are acting in compliance with 292.1, which would bring them within the limit of the exemption allowed by 416(a). That is our first point.

Irrespective of whether or not that is the legal situation, that as a matter of burden of proof is immaterial because the evidence is conclusive in this case that they are not acting within the exemption and are therefore operating in violation of section 401.

The Court: It is your position that any operation as an air carrier not within the exemption is a violation of 401?

Mr. Anthony: That is correct.

The Court: Whether it is scheduled or not?

Mr. Anthony: It doesn't make a particle of difference. And that is the position of the Civil Aeronautics Board itself.

The Court: You base that on the provision of 401(a) that [594] all air transportation is prohibited unless licensed?

Mr. Anthony: Unless authorized by the Board, that is correct.

The Court: Well, then, the issue in this case is basically whether or not they are operating within their exemption.

Mr. Anthony: Yes, that is correct, your Honor. In other words, or to put it the other way, are they operating in accordance with 401? Certainly there is no provision of either the regulations or the statutes which permits anybody to conduct a regular

scheduled service unless they hold a Certificate of Public Convenience and Necessity. Now, that being so, this Defendant is operating in direct violation of section 401. He admits that he is a common carrier. He admits, as he must, for the purposes of this motion, that there has been a continuous pattern of regularity since January of this year, which is disclosed by the evidence both from their own lips and also from the documentary evidence in this case, the daily schedules, daily schedules, day after day between—

The Court: Well, let me interrupt you right there in relation to that. Mr. Hewitt says that the evidence shows that prior to April the flights, such as they were, were charter flights. Thereafter, the evidence shows, the evidence shows flights but it doesn't show anything as to the nature of those flights, as to whether they were contracts, charter or regular [595] operations.

Mr. Anthony: Well, your Honor, that, of course, has been covered. It's been covered by several decisions of the Board itself. It's been covered and decided by Courts and the I. C. C. repeatedly. I shall deal with that question.

In the first place, using the magic expression "charter" doesn't connote anything unless the terms of the so-called charter are defined. Now, that word "charter" is borrowed from surface transportation. In fact, it is borrowed from motion transportation, surface transportation, and it means where there is a lease of a ship, a steamship owner will charter or demise his ship to a person for a

particular journey. Thereupon the profits and the revenues that inure to the vessel will go to the person holding the charter. Now, we don't have anything like that. In their own answer they admit that they are a common carrier. That automatically disposes of that charter argument. On their own answer they say they are a common carrier. And the testimony is conclusive and undisputed that is the Trans-Pacific Airlines that conducts the air transportation. So by the simple use of a glib expression, as Mr. Hewitt pointed out in one of his questions, you don't know whether these are charter operations or not. And one witness said, no, I don't know. That is certainly no evidence. But more than that, a common carrier cannot escape common carriage [596] by designating on his books or otherwise, or in his advertising, that there is in fact a charter operation. It is a fact, the fact that is essential, and the fact here is that they have been carrying the public generally. They are operating a daily service, at least three of the routes, between at least three of routes that we have evidence on in detail, which parallels the routes of this Plaintiff.

Now, so far as drawing any inference from the testimony and the excuses that Mr. Tongg and maybe some others stated that this is the way they had of getting around the force of the requirement of the certificate, that is absolutely immaterial to any issue here. The fact is that they have actually conducted the carriage. They are a common carrier. They have held themselves out as a common carrier. And the mere fact that on some of their

invoices they pay this mythical travel bureau, purportedly on a so-called hourly basis, is absolutely immaterial, because it is the Defendant that has control and operation, supervision, management of the aircraft. It isn't anybody else. It is the Defendant that conducts the carriage.

Now, the mere fact that they may have by this device set up a different method of compensation between them and the Pacific Travel Bureau is utterly immaterial as to the fact of whether or not they are constituted a common carrier. The authorities are replete on that, your Honor. I don't know [597] whether the Court has had a chance to examine the brief filed by it.

The Court: I have. I am familiar with that.

Mr. Anthony: The brief by the C. A. B. and this Board itself has passed on the same question. When I say this Board, I mean the Civil Aeronautics Board, notably in the Pan Airways case.

The Court: Yes, I understand the significance of the point you raise. It is one we will have to go into perhaps later if this case goes on.

Mr. Anthony: Well, as I was saying, the mere fact that it may be characterized—and that's all it is, a characterization here, there is no proof of a charter, none whatever—the mere fact that it may be characterized as a charter operation is utterly immaterial. The fact of the operation is that they carry the public generally as a common carrier. They follow a regular pattern. They depart at regular hours. They arrive at regular hours. They hold no Certificate of Public Convenience and Necessity

and therefore they are generally in violation of section 401 and they are in no respect in conformity with their so-called exemption. The regulation itself precludes any such notion as an irregular air carrier which this Defendant purports to be operating on a daily service.

Now, what he is saying is that because we don't have a [598] certificate—this is what the argument comes down to—we don't have to file schedules like a certificated air carrier, nor do we have to adhere to schedules like a certificated air carrier. We may have breaks in our schedules and therefore we are not in violation. In other words, they can run a regular service, that is what the argument comes down to, on a regular pattern without a Certificate of Public Convenience and Necessity, and there is no violation of section 401. And this despite the fact that 401 says that no one shall engage in any air transportation unless there is in force a certificate issued by the authorities authorizing such carrier to engage in such air transportation.

The cases that have been decided before have been decided on evidence which is nothing as compared with the overwhelming evidence in this record. There have been several trips that have been repeated over a period of two or three weeks and the Board has found—in air transportation I am talking about—that that is a pattern of regularity. That was the case in the Paige Airways case. It is the case in the Trans-Carribean Air Cargo and in the Trans-Marine Airlines matter. And it was on the

basis of those three decisions that the redraft of the economic regulation number 292.1 was promulgated. And this Court has followed the very standard of irregularity that has been laid down by the Civil Aeronautics Board itself, in those [599] cases. As counsel for the Board say in the brief that is on file here, this Court has been very careful to permit this Defendant to conduct all of the operations, air operations, that it is authorized to operate. And so long as that is all that this Defendant is enjoined from doing, that is, operating in excess of its authority, which excess would be in violation of section 401, this Court not only has jurisdiction but it is the duty of this Court to make the injunction permanent.

Mr. Hewitt: If the Court pleases, I would like to make this statement again. Section 401(a) says that no persons may engage—

The Court: I have it.

Mr. Hewitt: I have to find it myself.

The Court: No air carrier shall engage—

Mr. Hewitt: It says no air carrier shall engage in any transportation unless there is in force a certificate issued by the authority authorizing such air carrier to engage in such transportation. All right. Our contention is, your Honor, that we have been exempt under section 292.1 from section 401(a). In other words, this Board, Civil Aeronautics Board, has in this particular case never determined a violation, not interferred with the operations. They have had all the information regarding the flights. The evidence showed that quarterly reports have been filed. They have been cognizant of the

operation. They know everything there is to know about the operation. We have consistently told them not only in our application before the Board for an expeditious hearing on an application filed in July 1946, but we have personally informed them. I personally informed—

Mr. Anthony: There is no evidence of any of this, your Honor. Can't we confine ourselves to the record?

The Court: That would be better.

Mr. Anthony: I'd like to cross-examine counsel on that, of what he informed the Board.

The Court: That seems to be in point, Mr. Hewitt, but while we have an interruption here, I think I grasp what you are getting at, and let me ask you this. You are correct in contending that under the C. A. B. your Defendant has been exempt under another provision. And it is authorized to operate in accordance with that exemption. But if it exceeds its exemption, its operations go beyond its exemption, and is it your contention that it still is not a violation of 401?

Mr. Hewitt: No, sir. It is not my contention. My contention is that the Board, the Civil Aeronautics Board, should determine whether or not we are violating our exemption. In other words, the Board determines that.

The Court: Well, any air transportation by an air carrier which is either not licensed under 401 or not exempt under 416 [601] is a violation of 401 as to which this Court has jurisdiction—right?

Mr. Hewitt: No, sir. I do not agree. I will put it another way. If an air carrier is in fact exempt under 401 by some provisions of exemption within section 416, then the extent of the operations of that air carrier shall be determined from then on by the Civil Aeronautics Board, so far as the scope of those operations are concerned. And the reason for that is that this Court must interpret 292.1. They are not interpreting 401(a) because that is out of the picture now. This particular defendant has been exempt from 401(a). They have an exemption. They have a letter of registration which I am sure you are familiar with. It was brought out in the preliminary injunction. That being the case, whatever jurisdiction this Court takes is determining operations under a regulation, 292.1. And if the Court can determine and interpret a regulation such as 292.1, they certainly can determine them all, all the regulations. And I don't think that would be the intention of the law.

The Court: Well, there is no law against the judicial branch interpreting administrative regulations, is there? They are not so holy and sanctified that they can't be inspected and measured by the judicial branch of the government.

Mr. Hewitt: Your Honor, I think I have not made myself [602] clear. I say this, I don't say the Court hasn't the intelligence and the ability. I don't say that at all. I say it is a matter of law, not my idea of the law but what the Supreme Court says about the law, that this Court shall not take jurisdiction when an administrative body has already accepted jurisdiction.

When that letter of exemption was issued, the Civil Aeronautics Board thereafter has taken jurisdiction over the operations of this defendant. I don't say that it is impossible for this Court to do anything. I am talking strictly legally and the administrative law is very clear on the point.

Now, counsel refers to the brief, the Civil Aeronautics Board's brief. We have that brief and it skipped very lightly over the administrative problem. In fact, they just make a blunt statement that under section 1007 of the Civil Aeronautics Act the Court has jurisdiction, period. They don't talk anything about administrative law, primary jurisdiction. And I think it is a very important point. We have gone over it several times before, true, but nevertheless it is a vital point in this particular case.

The Court: Well, assuming for a moment that you are right, it is still a fact, isn't it, that Congress has made a specific provision in this C.A.B. law that violations of 401(a) may at the instance of the Board or an injured party be considered in a judicial proceeding? Now, if you are right that by issuing [603] this letter of registration exempting your client, the Board has thus taken jurisdiction of the issue for all purposes, do you mean to say that it would therefore follow that never could the matter be tested judicially as to whether or not that exemption is being violated and that the Board or the injured party could never have any recourse to the courts, assuming, for example, that the C.A.B., as might possibly appear in this instance, has sat idly by and done nothing, must an injured party also—

Mr. Hewitt: Your Honor, if the Board determines in fact, not as a matter of law but as a matter of fact, that there has been a violation after they have taken jurisdiction of the matter, then the Courts come into the picture and they certainly have the right to enforce.

The Court: But supposing the C.A.B. does nothing?

Mr. Hewitt: Well, whether or not the C.A.B. does nothing or not is I don't think material.

The Court: Well, it is certainly material to an injured party as a legal proposition. Under your construction, because of this exemption and C.A.B., on your theory having taken jurisdiction, it has thus acquired exclusive jurisdiction, but supposing it declined through either negligence or inadvertence or some other reason to act, must an injured party wait until such a time when, as, and if the C.A.B. decides to do something? [604] Or they can do, as Congress allowed them to do, and come into Court.

Mr. Hewitt: I think your Honor is correct. I think that is perfectly true. But I think the plaintiff must first show that he has exhausted his administrative remedy. There is no allegation in this complaint that he has done anything as far as the Civil Aeronautics Board is concerned. He hasn't tried it.

The Court: That is right, and we have been over that point.

Mr. Hewitt: And the law is very clear. The plaintiff should exhaust his remedies, and he has to make an allegation to that effect.

The Court: Well, I don't agree with you on that particular point. However, I would not have entertained this case if there was pending a square complaint based on this issue before the C.A.B. But your point on that is that this motion to intervene in connection with your petition for a certain amount to a complaint pending before an administrative board—

Mr. Hewitt: Well, it is, your Honor.

The Court: Well, I have heard you on that before and I am not going to change my mind. I think a statement may be made for one or two purposes, and it is very important for the purpose for which it is made. Apparently they have made a [605] statement based on facts similar to those alleged here. In connection with your pending application, for the purpose of blocking your application. Now, if they may possibly use the same facts for another purpose, which apparently they are doing here, namely, to procure an injunction, I don't agree with you that there is this issue now pending administratively before the C.A.B., and even if it was, this Court had taken jurisdiction first.

Mr. Hewitt: That is true, your Honor, but whenever there is any question of jurisdiction, either on the part of the Court itself or any suggestion as to jurisdiction, the Court has the right and the power to hear that jurisdiction.

The Court: Oh, yes.

Mr. Hewitt: To hear that.

The Court: Excuse me. But the C.A.B. will not oust a Court of jurisdiction, first, a Court of jurisdiction taking first—

Mr. Hewitt: But the power and discretion of the Court in determining that fact is very important. In other words, if I can show to this Court that, as a matter of fact, there has been a complaint made to the Civil Aeronautics Board prior to the hearing.

The Court: And you may have something if you do that.

Mr. Hewitt: Well, that is exactly what happened.

The Court: Well, there is no evidence here.

Mr. Hewitt: I don't know it.

The Court: At the moment, as things stand, there is no evidence of that.

Mr. Hewitt: No, your Honor, that is true.

The Court: All right. We will confine ourselves to what is before us.

Mr. Hewitt: Although it was before the Court on my motion on jurisdiction.

The Court: Well, I don't know. I have the impression you are talking about something different than that which I have heard. But it may be that you are still including this intervention thing in the way which I have always contended and concerning which I disagree. I am going to overrule your motion and you may have an exception. Before you start, we have almost consumed an hour arguing. Would you like a short recess to prepare?

Mr. Hewitt: Yes. Thank you.

(A short recess was taken at 10:55 a.m.)

After Recess

The Court: Now, you are ready and you do not wish to make an opening statement? If not, you may call your first witness.

Mr. Hewitt: No. Mr. Tongg, will you take the stand, please? [607]

* * * * *

(Mr. Hewitt summed up on behalf of Trans-Pacific Airlines, Limited.)

(A short recess was taken at 11:00 a.m.)

After Recess

(Mr. Anthony summed up in behalf of the Hawaiian Airlines, Limited.)

The Court: Yesterday when we discussed the hotly contested issue of whether there would be no oral argument but simply briefs filed, the Court ruled that we would have an oral argument and at the end of that oral argument if the Court saw fit to ask for briefs, feeling that it might at that time decide that it needed briefs, it would announce that fact, and if it needed briefs allow the parties to file the same.

Having heard the arguments presented by both counsel, I am satisfied that the issue is as concise and as clear as it was when the case first started, and that there are no briefs required by the Court for its assistance.

I am going at this time to announce my ruling and I will later reduce it to writing.

Upon a consideration of the points of law involved, as to which I have previously indicated I disagreed with Mr. Hewitt and Mr. Lear, I am satisfied that this Court has jurisdiction. [1137] I am secondly satisfied, from consideration of the documentary and other evidence in this case given by witnesses, that this defendant has operated in violation of Economic Regulation 292.1. And thirdly, I am satisfied that in so far as damages are concerned that an equitable basis exists here for the issuance of an injunction of a type prayed for in that the remedy at law is inadequate and that it is not necessary in a case of this sort to establish dollars and cents damage.

In particular I am satisfied in point of law that a franchise holder, limited though that franchise may be, is entitled to injunctive relief when exposed to unlawful competition to the damage and injury of the franchise which it holds. That is the case here. The Hawaiian Airlines holds a limited franchise issued to it by the Civil Aeronautics Board pursuant to an Act of Congress.

The evidence here discloses that this defendant is operating in violation and in excess of the permission heretofore granted to it by the Civil Aeronautics Board, and as to that excess operation over and beyond Economic Regulation 292.1. It is not covered by a certificate under Section 401(a) of the Act. That being so, working backwards in this discussion, the Court has jurisdiction under the Civil Aeronautics Act to grant the relief prayed for, and it will do so in substantially the same form

as a preliminary injunction took; that is, reserving the right to the defendant to increase its operation to the extent that the C.A.B. changes its mind from time to time, or it obtains a full certificate from the Civil Aeronautics Board. [1139]

* * * * *

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT, TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing pages numbered 1 to 1142, inclusive, are a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and that the costs of the foregoing transcript of record are \$19.90 and that said amount has been paid to me by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 17th day of February, 1948.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court, District of Hawaii.

DEFENDANT'S EXHIBIT "A"

Civil Aeronautics Board

Washington 25

Letter of Registration No. 163

Non-Certificated Irregular Air Carrier

Trans-Pacific Airlines, Ltd.

P. O. Box 2113

Honolulu, T. H.

is hereby acknowledged to have duly registered with the Civil Aeronautics Board as a Non-Certificated Irregular Air Carrier under the provisions of section 292.1 of the Economic Regulations, as amended, relating to irregular interstate and overseas air transportation of persons and property and irregular foreign air transportation of property only.

This letter of Registration is not transferable and may be suspended or revoked at any time in accordance with pertinent provisions of section 292.1 of the Economic Regulations, as amended.

This is not a certificate of public convenience and necessity and is merely evidence of registration.

Issued: July 8, 1947.

[Seal] /s/ M. C. MULLIGAN,
Secretary.

DEFENDANT'S EXHIBIT "C"

Docket No. 2390

Before the Civil Aeronautics Board

In the Matter of the Application of

TRANS-PACIFIC AIRLINES, LTD., Under Section 401 of the Civil Aeronautics Act of 1938, as Amended, for a Certificate of Public Convenience and Necessity Authorizing Air Transportation of Persons, Mail and Property on a Scheduled Basis Between the Terminal Point Honolulu, T. H., Intermediate Points Hilo and Upolu, Island of Hawaii, Puunene Field, Island of Maui; Lanai, Island of Lanai; Homestead Field, Island of Molokai; Port Allen, Island of Kauai, and Barking Sands, Island of Kauai.

PETITION TO INTERVENE

Communications with respect to this Petition should be sent to:

Stanley C. Kennedy, President
Hawaiian Airlines, Limited
Inter-Island Building
Honolulu 1, Hawaii

J. Garner Anthony
Robertson, Castle & Anthony
312 Castle & Cooke Building
Honolulu 1, Hawaii
Counsel for Petitioner

[Title of Board.]

PETITION FOR INTERVENTION

Hawaiian Airlines, Limited, a corporation incorporated under the laws of the Territory of Hawaii, petitioner herein, requests leave to intervene as a party in the above proceedings pursuant to Economic Regulations, Part 285, Rules of Practice, Section 285.6, Civil Aeronautics Board, and alleges:

1.

That petitioner is the holder of a certificate of public convenience and necessity issued to it pursuant to Section 401 of the Civil Aeronautics Act of 1938, 49 U.S.C. Sec. 481, authorizing it to engage in the transportation of persons, property and mail between points within the Territory of Hawaii and since the issuance of said certificate on June 16, 1939, has continuously engaged in air transportation as an air carrier pursuant to said act.

2.

That Trans-Pacific Airlines, Ltd., applicant above named, is a corporation incorporated under the laws of the Territory of Hawaii and is an air carrier within the meaning of the Civil Aeronautics Act of 1938 as amended and is now and since January 1, 1947, has been continuously engaged in air transportation carrying persons and property between points within the Territory of Hawaii by air as a common carrier without having a certificate of public convenience and necessity from the Civil Aero-

nautics Board; that said applicant since January 1, 1947, to the date hereof has conducted and is now conducting a regularly scheduled air carrier service between points within the Territory of Hawaii in violation of the Civil Aeronautics Act of 1938, and in violation of the Economic Regulations, Part 292, issued by the Civil Aeronautics Board.

3.

That applicant's regularly scheduled service substantially parallels the service furnished by petitioner pursuant to its certificate; that petitioner has an interest in the proceedings as the certificated air carrier operating the route applied for by applicant and that the protection of petitioner as a certificated air carrier against unregulated competition make it in the public interest that petitioner be allowed to intervene as a party in the above proceedings; that no other parties have appeared in the above proceedings and petitioner has a property and financial interest in said proceedings which would not be represented by the existing parties.

Wherefore, petitioner prays that it be allowed to intervene as a party in the above proceedings.

Dated: Honolulu, Hawaii, September 4th, 1947.

HAWAIIAN AIRLINES,
LIMITED,

By /s/ STANLEY C. KENNEDY,
Its President.

Territory of Hawaii,
City and County of Honolulu—ss.

Stanley C. Kennedy, being first duly sworn under oath, deposes and says:

That he is the president of Hawaiian Airlines, Limited, petitioner above named; that he has read the foregoing petition, knows the contents thereof and that the same is true and that he intends and desires in granting the relief requested that the Board shall place full and complete reliance upon the accuracy of each and every statement therein set forth; that to the best of his information and belief every statement contained in the instrument is true and no such statement is misleading.

/s/ STANLEY C. KENNEDY.

Subscribed and sworn to before me this 4th day of September, 1947.

/s/ DAVID L. PETERSON,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1949.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petition upon all parties who appear of record in Docket 2390.

Dated: Honolulu, Hawaii, September 5, 1947.

/s/ J. GARNER ANTHONY,
Counsel for Hawaiian Airlines, Limited.

[Endorsed]: No. 11865. United States Circuit Court of Appeals for the Ninth Circuit. Trans-Pacific Airlines, Ltd., a corporation, appellant, vs. Hawaiian Airlines, Limited, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed February 24, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth District

No. 11865

HAWAIIAN AIRLINES, LIMITED,
Plaintiff,
vs.

TRANS-PACIFIC AIRLINES, LTD.,
Defendant and Third Party Plaintiff,

vs.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED,
Third Party Defendant.

STATEMENT OF POINTS PURSUANT TO
RULE 75(d), FEDERAL RULES OF CIVIL
PROCEDURE

Now comes Trans-Pacific Airlines, Ltd., appellant herein, and pursuant to Rule 75(d) of the Federal Rules of Civil Procedure, sets forth a statement of points on which appellant intends to rely on appeal, as follows, to wit:

Point I.

That the United States District Court for the Territory of Hawaii had no jurisdiction of appellant.

Point II.

That at no time during the course of said proceedings did appellant submit to the jurisdiction of

said Court, but at all times appellant seasonably objected to the asserted jurisdiction of said Court.

Point III.

That appellant did not at any time waive its objection to said jurisdiction of said court.

Point IV.

That the ruling that the United States District Court for the Territory of Hawaii had jurisdiction over appellant and order of the United States District Judge affirming said jurisdiction, and the issuance of a Writ of Injunction therein was error.

Wherefore, appellant prays that the decree of said Court be reversed.

Dated: April 8, 1948.

TRANS-PACIFIC AIRLINES,
LIMITED,

By /s/ FREDERICK L. HEWITT,
Its Attorney.

[Endorsed]: Filed April 9, 1948.

